

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS NUMBER 99-0170**  
**RESPONSIBLE OFFICER**  
**SALES TAX and WITHHOLDING TAX**  
**For Tax Periods: 1993-1997**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning specific issues.

**Issues**

**Sales and Withholding Tax** -Responsible Officer Liability

**Authority:** IC 6-2.5-9-3, IC 6-3-4-8 (f), IC 6-8.1-5-1 (b), Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995) at page 273:.

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The taxpayer protests the assessment of responsible officer liability for unpaid corporate sales and withholding taxes.

**Statement of Facts**

The taxpayer was a shareholder and officer of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana. The taxpayer was personally assessed for the taxes. The taxpayer protested these assessments and a hearing was held. More facts will be provided as necessary.

**Sales and Withholding Tax-Responsible Officer Liability**

**Discussion**

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The proposed withholding taxes were assessed against Taxpayer pursuant to IC 6-3-4-8(f), which provides that “In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest.”

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the Taxpayer who has the burden of proving that assessment is incorrect. IC 6-8.1-5-1 (b).

Pursuant to Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995) at page 273: “The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid. The factors considered to determine whether a person has such authority are the following:

1. The person’s position within the power structure of the Corporation;
2. The authority of the officer as established by the Articles of Incorporation, By-laws or employment contract; and
3. Whether the person actually exercised control over the finances of the business including control of the bank account, signing checks and tax returns or determining when and in what order to pay creditors.

Id. At 273.

The taxpayer was the vice-president of the corporation. Vice-presidents often have significant control over financial affairs of corporations. The taxpayer was also the largest individual shareholder in the corporation with thirty-one (31) shares.

The Secretary of State's office provided a copy of the Articles of Incorporation. There was no listing of officers or designation of duties of the various officers. No copy of the corporate By-laws was available.

The final indicium concerns the actual control over the finances of the corporation. Corporate records indicate that the taxpayer was vice-president of the corporation. Affidavits from three former employees of the corporation indicate that from May, 1993 until February, 1996, the taxpayer held himself out as president of the corporation and indicated that he was in complete control of the operation. The taxpayer hired and paid the employees during this period. Checks recovered from this period were signed by the taxpayer. Corporate bank statements were mailed to the taxpayer's home address. The taxpayer, as president, filed the April-June, 1993 "Indiana Department of Employment & Training Services Quarterly Contribution Report." No remit sales and use and withholding tax returns were filed during this period. The totality of the evidence indicates that the taxpayer had adequate actual control over the finances of the corporation to be determined a person with the duty to remit trust taxes to Indiana. This supports the assessment of the trust taxes personally against the taxpayer.

Finally, the taxpayer alleges that another officer was actually the person responsible for the remittance of taxes. The law does not require, however, that only one person be considered a person with a duty to remit taxes to the state. In the Safayan case, the corporate president was held to be a responsible person even though the day to day operations were specifically delegated to a vice-president in his employment contract as manager. "A party may be liable for trust taxes without having exclusive control over the corporation's funds." Safayan at 274. Another officer's possible responsibility for the remittance of taxes does not absolve the taxpayer from responsible officer liability.

### **Finding**

The taxpayer's protest is denied.